Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

87 904

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICANA CORPORATION,
a Virginia Corporation,
Appellant,

v.

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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December 1987

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QUESTION PRESENTED

When private property is condemned and ownership is held by the State for almost fifteen years, and the State violates a statutory mandate to use the property for the purpose for which it was condemned within the statutory period, causing a judicial finding that the Certificate of Taking was "void" and "invalid" and revesting title in the landowner, may the State constitutionally refuse to compensate the landowner for the taking unless he can show direct damage to the property?

PARTIES

The appellant is Americana Corporation, a Virginia corporation (the "landowner"), which was the owner of commercial real estate taken through exercise of the power of eminent domain. The appellee is the Virginia State Highway and Transportation Commissioner (the "State") and is the party who exercised the power of eminent domain over the landowner's property. 28 U.S.C. Section 2403(b) may be applicable.

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IN THE

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No.

AMERICANA CORPORATION,
a Virginia Corporation,
Appellant,

v.

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

AMERICANA CORPORATION, appellant, appeals from the judgment of the Supreme Court of the State of Virginia, entered June 8, 1987, refusing its Petition for Appeal directed to a judgment of the Circuit Court of Arlington County upholding the constitutionality of a Virginia statute on damages recoverable as a result of an eminent domain taking, and the final judgment of the Supreme Court of the State of Virginia, entered September 4, 1987, refusing its Petition to Set Aside the judgment rendered on June 8, 1987 and grant a rehearing thereof. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented as to the constitutionality of a Virginia statute.

OPINIONS BELOW

Citations to the Appendix to this Jurisdictional Statement will be designated "p...a". The Supreme Court of Virginia rendered no opinion, but merely entered an unreported Order declining to hear the case by refusing the Petition for Appeal [pp. 1a, 2a]. The decisions of the Circuit Court of Arlington County are reflected in an Order entered August 1, 1986 [p. 3a], two Orders entered October 8, 1986 [pp. 19a, 21a], and in the transcript of proceedings of July 29, 1986 in which the trial court states its rationale for the August 1 Order [p. 5a].

JURISDICTION

This case arose out of a condemnation action in which the State divested the landowner of fee simple title to commercial property in Arlington County, Virginia. By Order entered August 1, 1986, the Circuit Court of Arlington County ruled that the landowner was entitled to a reconveyance of the property because the State had violated a statutory mandate to commence construction of the highway for which the property was condemned within twelve years from the date of taking [p. 3a]. The trial court then continued the case for a hearing to fix the damages to which the landowner was entitled as a result of being deprived of ownership of its property. By Order entered October 8, 1986 [p. 19a], the trial court ruled that the statute giving the landowner the right to claim damages restricted recovery to those elements which could be shown to involve direct injury to the property itself.

In both the trial court and the Supreme Court of Virginia, the constitutional issue was raised, both by the landowner and the Court. It is not alleged that the statute is unconstitutional on its face; rather, the unconstitutionality stems from the affirmance by the Supreme Court of Virginia of the trial

court's decision that the statute denies compensation to a landowner deprived of his property for almost fifteen years unless there happens to be some direct damage to the property.

The Supreme Court of Virginia denied the landowner's Petition for Appeal on June 8, 1987 [p. 1a], and denied the landowner's Petition for Rehearing on September 4, 1987 [p. 2a]. On November 13, 1987, Notice of Appeal to this Court was filed in the Supreme Court of Virginia, with a copy lodged in the Circuit Court of Arlington County on that same date [p. 23a]. The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by 28 U.S.C. Section 1257(2). However, since the Fifth Amendment requires just compensation even in the absence of a Virginia statute specifically granting the right to claim damages flowing from the invalidation of the certificate, in the event that this Court believes that this case is not a proper subject for direct appeal, the landowner asks that, pursuant to 28 U.S.C. Section 2103, this Jurisdictional Statement be treated as a Petition for Writ of Certiorari. This Appeal is docketed in this Court within 90 days from the denial of the Petition for Rehearing below. The following decisions support the proposition that the erroneous failure by a state court to pass on a constitutional objection to a state statute is equivalent to a finding that the statute is valid. *Largent v. Texas*, 318 U.S. 418; *Lawrence v. State Tax Commission*, 286 U.S. 276, 282-83.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment Fifth, United States Constitution:

. . . nor shall private property be taken for public use, without just compensation.

Amendment Fourteenth, United States Constitution, Section 1:

. . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 33.1-90, 1950 Code of Virginia

Acquisition of real property which may be needed for highways or projects. — When the State Highway Commissioner determines that any real property will be required in connection with the construction of a highway project, or "project" as defined in Section 33.1-268 of the Code, within a period not exceeding twelve years for the Interstate Highway System or ten years for any other highway system from the date of such determination, and that it would be advantageous to the State to acquire such real property, he may proceed to do so. The State Highway Commissioner may lease real property so acquired to the owner from whom such real property is acquired, if requested by him, upon the terms and conditions as in the judgment of the Commissioner may be in the pubic interest. In the event that the highway project, or project as defined in Section 33.1-268 of the Code, contemplated has not been let to contract or construction commenced within a period of twelve years, if in the Interstate Highway System, or eleven years, if in any other system of highways, from the date of acquisition of such property, upon written demand of the owner or owners, their heirs or assigns, such property shall be reconveyed by the Commonwealth of Virginia to such owner or owners, their heirs or assigns, upon repayment of the original purchase price, without interest. Any such contract shall provide for the completion within three years.

Section 33.1-122, 1950 Code of Virginia

Recordation of certificates; transfer of title or interest; land situated in two or more counties or cities. — The certificate of the Commissioner shall be recorded in the clerk's office of the court where deeds are recorded. Upon such recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth and such owner shall have such interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged, and all liens by deed of trust, judgment or otherwise upon such property or estate or interest shall be transferred to such funds. The title in the Commonwealth shall be defeasible until the reaching of an agreement between the Commissioner and such owner, as provided in Section 33.1-129, or the compensation determined by condemnation proceedings as hereinafter provided.

If the land affected by the certificate aforesaid is situated in two or more counties or cities, the clerk of the court wherein the certificate is recorded shall certify a copy of such certificate to the clerk of the court of the counties or cities in which any portion of the land lies, who shall record the same in his deed book and index it in the name of the person who had the land before and also in the name of the Commonwealth.

Section 33.1-125, 1950 Code of Virginia

Reformation, alteration, revision, amendment or invalidation of certificate. — Upon the recordation of such certificate [the certificate of taking vesting title in the State], no reformation, alteration, revision, amendment or invalidation shall be made for any purpose without the prior consent of the Court wherein such certificate is recorded. The court or judge

in vacation shall have jurisdiction to reform, alter, revise, amend or invalidate in whole or in part any certificate, to correct mistakes in the description of the property affected by such certificate, to correct the name or names of the owner or owners in the certificate, to correct any other error which may exist with respect to such certificate or for any other purpose. A petition filed by the Commissioner with the Court setting forth any error made in such certificate or the necessity of any change therein, shall be deemed sufficient basis for the reformation, alteration, revision, amendment or invalidation in whole or in part of such certificate. The Court may enter an Order permitting the reformation, alteration, revision, amendment or invalidation in whole or in part and such Order, together with any revised certificate which may be necessary shall be spread in the current deed book, and reference made showing the book and page number of the Order on the margin of the page wherein the original certificate was spread. The filing of any certificate pursuant to the provisions of this Section shall not alter the date of taking as established by the filing of the original certificate pursuant to Section 33.1-122 as to any land which is included in the amended certificate, and no such amended certificate shall include any land not in the original certificate. Nothing herein contained shall be construed to prohibit or preclude any person damaged thereby, from showing in the proper proceeding the damage suffered by reason of such mistake or the invalidation of a certificate of deposit as herein provided.

Section 33.1-125 is alleged to be unconstitutional.

STATEMENT OF THE CASE

The jurisdiction of this Court is invoked to affirm the principle that the Just Compensation Clause requires that a landowner be paid for a temporary divestment of his fee simple

ownership of property where the State's taking under power of eminent domain is subsequently invalided. Fifth and Fourteenth Amendment issues arise because both the trial court and the Virginia Supreme Court have held that Va. Code, Section 33.1-125, Virginia's statutory procedure whereby a landowner may obtain damages for an invalid taking, entitles a landowner to nothing in compensation for the period of divestment unless he can show a direct injury to his property.

In *First English Evangelical Lutheran Church v. County of Los Angeles*, ____ U.S. ____, 107 S.Ct. 2378 (1987), this Court held that the government must pay a landowner for temporary regulatory takings. Here, the landowner seeks an extension of that holding to require payment for temporary deprivation of fee simple ownership of property as opposed to temporary deprivation of its use.

It is not necessary to decide whether, under the facts of this case, there has been a taking, or whether the deprivation amounted to something less than the landowner's entire estate. Va. Code, Section 33.1-122, provides that immediately upon recordation of the Certificate of Taking, title of the landowner "terminates" and vests in the State. [p. 5]. Also, there is no dispute as to the duration of the taking: January 7, 1972 to August 1, 1986. Finally, the parties agree that at the time of the taking, although the State did not require the entire property for the highway project, it nevertheless condemned the whole of the landowner's estate. [p. 12a]. The sole, narrow issue is whether the landowner may constitutionally be denied compensation for the period of deprivation in the absence of direct damage to the property.

On January 7, 1972, the State filed a Certificate of Taking, divesting the the landowner of title to its commercial property located on the highly developed Route 1 corridor in Arlington County, Virginia. The State retained title for almost

fifteen years and refused to reconvey to the landowner until forced to do so by Order of the Circuit Court of Arlington County.

The property which vested in the State comprises approximately 61,473 square feet of real estate improved by a 102-room motel. At the time of the taking, the landowner held a building permit for renovation and enlargement of the facility. The value assigned to the property in the Certificate was $1,596,295. After the taking, the landowner never drew down the sum represented by the Certificate but continued to operate the motel, albeit without the agreement of the State. In fact, at one point in time, the State ordered the landowner to vacate, but never pursued this demand and never took possession of the realty except for a brief incursion in 1976-77. It was during this period that certain incidental damage occurred (demolition of the swimming pool and driveway and removal of a sign) which the Arlington Court found to be "directly related to the property" and for which compensation was awarded.

On April 10, 1986, the State filed a condemnation action and the landowner responded by asserting, among other defenses, a right to reconveyance of the property. The landowner's claim was based upon Va. Code Section 33.1-90 [p. 4] which, at the time of the taking, provided that if the highway project had not been let to contract or construction commenced within a period of twelve years from the date of taking, the landowner had a right to demand and receive from the State a reconveyance of the property. In June of 1986, the State began highway construction and the landowner filed a Motion for Injunction in the condemnation action. On August 1, 1986, the Arlington Circuit Court entered an Order sustaining the landowner's position, finding the Certificate "void" and "invalid" and enjoining the State

from further highway construction until there was a proper taking [p. 3a].

In instances where a condemnation certificate is found invalid for any reason, Va. Code Section 33.1-125 gives a landowner the right to introduce evidence of damages caused by the taking [p. 5]. Accordingly, as a part of the August 1 Order, the Arlington Court set the case for hearing on damages. However, prior to the hearing the trial court granted the State's Motion in Limine, precluding the landowner from introducing evidence of attorney's fees, accountant's fees and business and economic loss as elements of damage. When the Motion in Limine was sustained, the parties stipulated the damages which directly related to the property, without prejudice to the claims of either. [p. 21a]

The issue here is not the compensation to which the landowner would be entitled in the usual condemnation case, where the State uses the property and retains the fee. That did not happen because the State did not properly pursue the condemnation. The issue is to what damages the landowner is entitled by virtue of the State having deprived it of ownership of its property for almost fifteen years and *not* used it for the purpose for which it was taken.

In every instance of a taking of private property by the State, just compensation must be paid. Amendment Fifth, United States Constitution. It follows that a statutory scheme is unconstitutional if, in any case of an admitted taking, it purports to contract the Fifth Amendment mandate by predicating the *right* to compensation, as opposed to the amount thereof, on the nature of the damages suffered. The landowner contends that Section 33.1-125 is unconstitutional because it permits the State to appropriate a citizen's full fee simple interest in property for a period beyond that permit-

ted by statute and pay no compensation whatever, so long as there is no incidental damage to the property arising from the State's ownership.

The precise constitutional issue which is the subject matter of this appeal did not arise until the State's Motion in Limine was sustained. However, constitutional issues have been raised from the outset of the proceedings, both by the landowner and by the trial court. [pp. 53a, 54a] The landowner raised constitutional issues in its Brief in Opposition to the Motion in Limine [pp. 43a, 44a] and in oral argument before the trial court. There is no transcript of this argument. The trial court made no specific constitutional ruling, but rejected the landowner's contention that the statute unconstitutionally deprived it of just compensation by sustaining the Motion in Limine. Constitutional issues were again raised in the Petition for Appeal to the Virginia Supreme Court [pp. 43a, 44a,] and in the Petition for Rehearing to the Virginia Supreme Court [pp. 47a, 48a, 56a]. The Virginia Supreme Court refused to hear the appeal [p. 1a], and accordingly made no specific ruling on the constitutional issue.

THE QUESTION IS SUBSTANTIAL

Condemnation is a necessary evil — necessary because at times the public good requires the appropriation of private property; evil because involuntarily divesting a citizen of his property runs counter to fundamental constitutional concepts. Accordingly, certain constitutional prerequisites to the exercise of this extraordinary power were early established and have remained constant and inflexible through the years: the State must show a public necessity for the taking, the taking must be the minimum necessary to satisfy the public need and the citizen must be given just compensation for the loss

of his property. As this Court has stated, "just compensation" grows out of the esssential nature of all free governments; however, if no necessity exists for the taking, the State cannot constitutionally exercise the power of eminent domain even if just compensation is offered. *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U.S. 239, 252 (1905). The mandatory requirement of "just compensation" has its genesis in the language of the Fifth Amendment itself, and it is on the issue of just compensation that this appeal is centered.

The operative facts are undisputed and dispositive:

1. The fact that there was a taking is not at issue, nor is the fact that the State took title to the landowner's entire fee simple estate in commercial property on which it was actively operating a motel.

2. The duration of the taking was fourteen years and seven months (January 7, 1972 to August 1, 1986).

3. The taking was accomplished by the statutory procedure which allows the State immediately to vest title in itself by filing a certificate to that effect and reciting that a certain sum, judged by the State to be the value of the property, is on deposit for payment to the landowner.

4. The taking was in excess of that required for the highway project for which the power of eminent domain was exercised; specifically, the State admits that at the time of the taking (and today), there was absolutely no need to touch the motel building itself [pp. 12a, 50a, 51a, 55a].

5. The Circuit Court of Arlington County found the certificate to be "void" and "invalid" because the State had not commenced road construction within twelve years from the date of taking as required by statute.

6. Va. Code, Section 33.1-125 gives circuit courts jurisdiction to:

> . . . invalidate in whole or in part any certificate, to correct mistakes in the description of the property affected by such certificate, to correct the name or names of the owner or owners in the certificate, to correct any other error which may exist with respect to the certificate *or for any other purpose.* [Emphasis supplied].

The statute goes on to emphasize that nothing contained therein shall preclude any person from showing the damage suffered by reason of the invalidation of the certificate.

7. Based upon the language of Section 33.1-125, the trial court set a hearing on damages but then ruled that the statute precluded the landowner from introducing evidence of any damages other than direct injury to the property itself. Thus, although the landowner proffered that it had incurred counsel fees, accountant's fees and had suffered great economic and business loss during the amount almost fifteen years during which it was deprived of ownership of its commercial property, the trial court found that these losses were excluded from the constitutional mandate of "just compensation."

The facts of this case are somewhat akin to a traditional "temporary taking", but there is a major difference. When there is a temporary taking, the fact of its temporary nature customarily is known from the outset. Therefore, by definition, a temporary taking in the traditional sense never involves the taking of the fee. The State needs only the *use* of the property for a limited period, and it would be constitutionally impermissible to take more than necessary by condemning the entire fee. As a result, it is known from the outset that factors other than the fair market value of the fee must be

utilized in determining just compensation. But in a case where, at the time of taking, it is contemplated that the landowner's entire estate will be permanently taken, no provision is made for compensating the landowner if it subsequently develops that his deprivation of ownership was temporary. In the latter instance, "traditional" or "normal" condemnation damages cannot provide the measure of just compensation since the proceeding has entirely changed in character. The State may have deposited a sum which it unilaterally established as the fair market value of the fee, but the landowner must return the deposit (or not have drawn upon it) in order to regain ownership. The constitutional infirmity of the Virginia statute arises from the fact that it limits a landowner whose fee simple interest has been temporarily taken to the compensation he would receive if the fee had been permanently taken, *but excluding* the value of the fee.

Since the Fifth Amendment requires compensation even in the absence of a Virginia statute specifically granting the right to claim damages flowing from the invalidation of the certificate, the State does not, and could not contend that the landowner is entitled to no compensation as a result of being deprived of ownership for almost fifteen years. However, the State does contend that it is not required to compensate the landowner for the temporary taking of a fee unless there is direct damage to the property. When there has been a taking of the fee and the project is either abandoned or the property reverts because the State has unreasonably delayed in commencing the use for which the property was taken, it is reasonable to assume that, more often than not, the result under the Virginia statute will be no compensation to the landowner. The very circumstances indicate a high likelihood of no direct damage to the property in view of the fact that construction has not begun. It was coincidental that in this case there was a brief incursion during which there was damage

to the swimming pool and a sign. Had this not occurred, the landowner would have been denied all compensation for the fifteen-year deprivation. Since the Fifth Amendment requires just compensation in *every* case where property is taken, a statute which denies compensation in *any* case is unconstitutional.

Certainly, economic loss is reasonably foreseeable when the State takes commercial property on which a business is being operated. However, at trial, the State successfully clouded the constitutional issue by arguing that the landowner remained on the property and continued to operate the business, that the business losses proffered were too speculative to be recoverable under Virginia law and that such losses were traditionally not cognizable in condemnation cases.

The question is not whether the landowner received some return from the property during the period of deprivation. The fact that a party may mitigate his damages is generally a prerequisite to the right to claim damages; it clearly is not a basis for denial of provable damages. Here, the landowner was able to make some use of the property during the fifteen-year period, but not as an owner. Likewise, the case is not in a posture for determination of whether, when all the evidence is in, the landowner would be able to sustain its claim that the damges are not remote or speculative. These are mattes for determination by the trial court after hearing. Here, there was a taking of property, and the landowner's compensation could not be based upon the fair market value of the land because the State did not follow through and retain the fee. Therefore, in determining just compensation, the Fifth Amendment requires that the landowner be permitted to introduce evidence of damages other than direct damage to the property.

The landowner will not presume to instruct this Court in

the constitutional principles applied in previous decisions involving takings of property, nor will it burden this Jurisdictional Statement with citations to cases which, while perhaps analogous, were impacted by factors qualitatively different from those present here. Suffice it to say that the landowner reads *First Evangelical Lutheran Church v. County of Los Angeles*, ____ U.S. ____, 107 S.Ct. 2378 (1987), as affirming the general principles urged here. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken, and the State must be required to pay the landowner for the value of the use of the land during the period of deprivation of ownership. It follows that this is a meaningless precept if, by statute, a State is able to exclude the only evidence which can provide a measure of the owner's loss. Here, the landowner felt that the taking was unjustified, and, fifteen years later, the State's own witness admitted that there was absolutely no reason to take title to the motel [pp. 50a, 51a, 55a]. The landowner refused to vacate the property and continued its motel business as best it could, "in limbo." The effect on the landowner was enormous. It could not borrow money against the property. It could not improve the motel. It could not expand its business facilities as planned. Even ordinary and routine maintenance was financially risky because it no longer owned the property and the State could enforce its demand for possession at any time. It had no lease, but rather occupied the position of a tenant at sufferance, having no entitlement, clinging only to bare possession. As could be expected, the premises deteriorated over the fifteen-year period. If the planned highway could not be constructed in the forseeable future, the State could have withdrawn the certificate. Instead, it choses to do nothing. It now contends that, but for the incidental physical damage to the property, the landowner is entitled to nothing for this taking.

At trial, the State argued that if the landowner had not

been properly compensated, it was its own fault — it could have drawn down the sum evidenced by the certificate and earned interest during the period of deprivation. The trial court rightly dismissed this arrogant position.[1] Distilled to its essence, the State is saying that it is privileged to arrogate to itself, by legislative fiat, the measure of just compensation in cases where, through its statutorily unreasonable delay, the landowner is entitled to a reconveyance of its property. The landowner must accept the State's valuation of the property and rely upon what interest on the money it is able to obtain for some unspecified period. Its alternative is to forego compensation altogether. The Virginia statute gives legislative sanction to the State's position that in those instances where there is a temporary taking of the fee, the State is above the Constitution.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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(703) 841-0011
Counsel for Appellant

December 1987

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[1] "Just to say well, he could have drawn down does not make me feel any better because you have a person who's sitting on limbo worrying about their property for 15 years. And to say well, there was some money over there that he could have drawn down on, true, but they [might] have drawn down too much; they may have been given something." [p. 52a]

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 8th day of June, 1987.

Americana Corporation, etc., Appellant,

against Record No. 870009
Circuit Court No. L-26835

State Highway and Transportation Commissioner, Appellee.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy.
Teste:
David B. Beach, Clerk
By: /s/ Devra A. Roman
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 4th day of September, 1987.

Americana Corporation, etc., Appellant,

against Record No. 870009
Circuit Court No. L-26835

State Highway and Transportation Commissioner, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 8th day of June, 1987 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
/s/David B. Beach
Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER	)	
Petitioner	)	
v.	)	At Law No. 26838
AMERICANA CORPORATION, a Virginia Corporation, et als.	)	
Defendants	)	

ORDER AND INJUNCTION

THIS CASE came on the 29th day of July, 1986, upon the Motion for Injunction filed by Defendant, the objections to the taking filed by the Defendant in its responsive pleadings, the briefs of the parties, the testimony of the witnesses, and the argument of counsel: and

IT APPEARING for the reasons set forth in the Court's verbal opinion rendered, it is accordingly

ORDERED: (1) that the Certificate of Taking (No. C-20926), dated December 22, 1971, and recorded among the Arlington County land records on January 7, 1972 at Deed Book 1774 at Page 400, be and the same hereby is declared to be void, invalid and of no further force and effect; and (2) the defeasible title obtained by the Commonwealth by virtue of the recordation of the Certificate and *Code* §33.1-122 is hereby defeased and, as of July 29, 1986, fee simple title, subject to all existing liens and encumbrances of record, is vested in the Defendant, Americana Corporation; and (3) no

further road construction shall take place which affects the property of the Defendant until such time as the Commonwealth has taken the property necessary therefor by appropriate eminent domain procedures; and (4) this case is continued for hearing on the issue of damages occasioned by the taking under Certificate No. C-20926; and (5) the Clerk of this Court is directed to spread this Order among the land records of Arlington County, Virginia.

AND THIS CAUSE IS CONTINUED.

ENTERED this 1st day of August, 1986.

/s/
Benjamin N.A. Kendrick, Judge

I ASK FOR THIS:

/s/ Charles McDonnell Radigan
Charles McDonnell Radigan
Counsel for Defendant,
Americana Corporation

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2009 North 14th Street, Suite 215
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(703) 841-0011

SEEN AND EXCEPTED TO:

/s/ William B. Moore, Counsel for
State Highway and Transportation
Commissioner

BEAN, KINNEY, KORMAN, HYLTON & MOORE
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(703) 525-4000

PARTIAL TRANSCRIPT OF PROCEEDINGS
JULY 29, 1986
OPINION OF THE COURT

THE COURT: I would like to say initially that I have read the briefs that have been filed by counsel and have taken into consideration as well the testimony in the previous argument, and I would like to say further that I am extremely impressed with the expertise of both attorneys and their demeanor, especially the manner in which both of them have championed this client's causes.

I think that I have, in preparation for this ruling, made notes that I would like to refer to, so in the event that either one or both of the parties seek review of this decision, that the Supreme Court will have the benefit, for what it is worth, of my reasoning in reaching the decision.

It is with that in mind that I would like to read the notes that I made.

"The right to take or damage private property for public use is wholly statutory and can be exercised for the purpose and to the extent and in the manner provided by law."

That's language taken out of the *Puget vs Martin* case at 208 VA 529.

"The taking of private property is a matter of serious import and is not to be permitted except where the right is plainly conferred in the manner of its exercise strictly. There must be no doubt or uncertainty of the existence of the cause. If it is not plainly conferred, it does not exist.

In the construction of such statutes, every reasonable doubt is resolved adversely to the right. The affirmative must be shown, as silence is negation, and unless both the spirit and

letter of the statute clearly confer the power, it cannot be exercised."

"The date of valuation of property taken in eminent domain proceedings is the time of the lawful taking by the convenient authority."

The certificate of taking was filed in this case in 1972 and if that certificate is lawful, valid, and presently in effect, then the evaluation date for the defendant's property is 1972.

This is so even though the State has taken no substantive action to construct the road or let the contract in fourteen years, which had not elapsed since 1972.

Code Section 33.1-90, which was in effect in 1972, provides in part "In the event that the highway project contemplated has not been let to contract or construction within a period of twelve years, if in the interstate highway system, or eleven years if in any other system of highways, from the date of acquisition of such property upon written demand of the owner or owners, their heirs or assigns, such property shall be reconveyed by the Commonwealth to such owner or owners, or heirs, or assigns upon repayment of the original purchase price without interest.

Any such contract shall provide for completion within three years."

This section 33.1-90 was subsequently amended and at the present time before a property owner can require reconveyance he must show several things.

One, that twenty years have passed since the acquisition without construction or the letting of the contract, but there is two, an extension in this time limit for the number of days occasioned by the litigation involving the project and there is an extension for the number of days occasioned by the

failure of the Commonwealth to receive the anticipated federal funds for the project, and there is also in this section "that does not apply to the rights of way acquired by local governing bodies," and finally, "it does not apply for rights of way required for future additional lanes, service roads or interchanges. These exceptions and extensions of time substantially diminish the rights granted to condemnees in 1972 by the Virginia statute."

Further, the Virginia Code in Section 1-16 provides in part that "no new law shall be construed to repeal a former law as to any offense committed against the former law or as to any act done, any penalties, forfeiture or punishment incurred or any right accrued or a claim arising under the former law."

At the time of the taking, that's in 1972, in the case before the bar, the provisions of Code 33.1-90, in this Court's opinion, gave the defendant a possibility of revert. "The State shall reconvey upon the request of the land owner and tender of the purchase price without interest if construction is not started or the contract not let within the time specified."

The former owner does not have a present estate as such, but rather the possibility that the fee may return to him by breach of its condition subsequent. This possibility of revert retained by the defendant is a right and not a mere privilege.

A possibility of reverter is available by deed or will and will descend intestate succession.

Code 33.1-90 directs that "the property be reconveyed to the owner or its assigns or its heirs. Such a right cannot be divested by a third party, unless that party strictly meets the condition subsequent, which will enlarge his fee into an absolute fee."

"The State should not be allowed to divest a vested or a substantive right by subsequent legislation, nor take the possibility of reverter without the additional compensation, as such would violate due process of law.

Words of the Statute ought not be given or have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intent of the legislature cannot otherwise be defined.

Rights accrued, claims arising, proceedings instituted, orders made under similar law or judgments rendered before the passage of an amended statute will not be affected by, but will be governed by the original statute, unless a contrary intention is expressed in the latter statute."

The amendments to the section here in question, Code 33.1-90, do not express any such intent on the part of the legislature to make that section retroactive. All aspects of the condemnation proceedings must be governed by the section and the law at the time of the taking.

Therefore, it is this Court's opinion that the present Certificate of Taking is void and unlawful and the Commonwealth is ordered to reconvey the land to the defendant and not proceed with the construction of the highway until such time as a new and proper Certificate of Taking has been filed.

Your exception is noted.

MR. MOORE: The one issue that raises up, your Honor, is the — if we go ahead and note our intent to appeal, I would assume that would stay the action of that order relative to any construction, just as the execution of any judgment. 8.01-676, as I understand it, would not require that the Commonwealth put up any bond.

I would just ask that the fricasee of that order then be

stayed for thirty days to allow us time — and be suspended pending our noting our appeal.

THE COURT: Has construction stopped?

MR. MOORE: Not to my knowledge.

THE COURT: Well, it seems like if the construction stops —

MR. MOORE: Well, I mean I am informed it doesn't make any difference. I'm informed they are proceeding. They are having some problems with rocks. They are continuing. I'm not really being kept up-to-date on those aspects of it.

If the court orders that and we note our intent to appeal, just as any other order, if we indicate our intent to appeal, then that is stayed pending our notation of appeal and then a supercedes bond or whatever.

But in this case, since the Commonwealth does not have to post a bond, I assume that if we note our appeal, then that would be stayed pending a review by the court?

THE COURT: The injunction would be stayed?

MR. MOORE: Any orders to stop, yes, sir, because that really goes to the heart of the issue. I mean it is basically a final ruling. So that order would be a final order, appealable, so that the remedy I think is our appeal as opposed to say trying to obtain a justice to deal with the injunction aspect of it.

So I think the format, though it may be kind of arises a little differently, is no different from any other stay of any order pending any appeal, and I would just ask that we do that and have that understanding so we can incorporate that in the order which will be drafted.

THE COURT: Mr. Radigan?

MR. RADIGAN: If the court please, I would vigorously oppose any stay of the order. There are a number of issues involved here.

Not wishing to over-complicate this matter and it may well be that based on this court's ruling that Mr. Moore and I may well be able to get together and arrive at a procedure.

I am not prepared to argue the strict appellate procedure to be followed. I am aware the Commonwealth is not required to post a bond for appeal, but I think to stay the order merely would allow the Commonwealth to proceed without — not under any right of law, but if the Commonwealth, I'm sure, would act and reconvey this property and issue another certificate while retaining its rights, without waiving its rights —

THE COURT: You mean its appellate rights?

MR. RADIGAN: That's right, to appeal, because we are just talking about dollars in that sense and I'm not convinced that this injunction is the type of final order that may be appealable.

It is all a part of a combination procedure and proceeding, and the substance of it is to require new valuation data, and it does not in any way affect the right of the Commonwealth to proceed to construct the highway or to proceed to initiate another taking without prejudice, and we would concede that and would agree by stipulation that such action by the Commonwealth would not be with prejudice to their rights to appeal, and accordingly, I would ask that the injunction not be stayed.

The Commonwealth has the same rights of any other litigant to appeal. If they wish to do so, that's fine, but they have no claim of right based upon the Court's ruling right now to come on that property and do anything with it.

MR. MOORE: Judge, we are not asking for any other rights. I'm just saying, putting it in the context as any other litigant, if a judgment order were entered by a jury and they then go ahead and appeal that, they then stay the execution of that judgment as far as living on the property, pending the noting of the appeal and the assignment of the bond.

In this case, we don't have to do the bond. So as any other case, we note that then we are no different from any other litigant.

The concern is if, you know, that's a final order in the case. If it goes up and say the court sustains, at that point the court simply — at that point he has rights. He could simply file an inverse condemnation as to what has been taken or done or the state at that point could file a new amended certificate with a later valuation date which is maybe to his client's advantage, although I don't know.

He wanted a later date and that would give it to him.

I think if there is an appeal then the Court's order is stayed. That's all I'm asking, ostensibly that the State be there under color of authority pending the determination of the appeal.

He is protected by any inverse condemnation, whatever fees — compensation at one point or another. If the State elects to go ahead and delay the filing of a new certificate, it seems like it would not prejudice his client, that's what he wanted anyway was a later evaluation date.

I would ask respectfully that the court — if you need to get together on it, I would like to in the drafting of the order, but I would certainly intend to put that in the order, so that the court's order be stayed. You know, the reverter of the land as well as the construction.

MR. RADIGAN: I'll make one point and sit down. The

problem that this raises is this court has ruled is that the certificate is invalid and unlawful and has ordered the Commonwealth not to proceed, unless they proceed according to law.

Now, if that contractor comes on Mr. Greene's property tomorrow, I'm going to tell him to go to the Commonwealth attorney to get a warrant. Why not? It is trespass. There is no color of authority or right on the part of the contractor as an agent of the Commonwealth to come on the property, and whatever the rules with respect to appeal and says are concerned, let them apply, but just let your order issue.

THE COURT: I'm not going to grant the stay at this time, Mr. Moore, and I neglected to say a couple of things I think should be said.

There were several questions that were raised in addition to the validity of the certificate. One was whether or not there was a bonafide offer. That question was not reached in this proceeding.

However, I think both sides concede that the entire track was not needed for whatever was sought in 1972, nor what is sought today, and I think that's an important factor.

The other question that was raised was raised sua sponte and that's whether or not there was an abandonment in the technical sense. That question was not reached by this decision.

The only thing this decision goes to is the validity in the statutory construction, interpretation of the law that was in existence in 1972.

It seems like to me if the State wanted the benefit of the twenty-year extension they should have refiled and gotten the benefit of the twenty time period. I do not believe there was anything in that law that would suggest that it be retroac-

tive. Just the opposite is my undestanding of the statutory interpretation, especially in an area, notwithstanding it's a quid pro quo statute or series of statutes, I think they have to be strictly construed, and that's what I have attempted to do.

I'm not going to stay the injunction. It is in position today.

* * * * *

PARTIAL TRANSCRIPT OF PROCEEDINGS
AUGUST 1, 1986

MR. RADIGAN: Judge, I prepared a draft of an order. I prepared a previous draft. Mr. Moore objected to the form of it. I have redone it in this form, which I'm sure he will not agree to either.

I'd like to, if I could, go through it. With respect to the order paragraph, it refers to the certificate being the same and hereby is declared to be void, invalid and of no further force and effect; and, two, a defeasible title obtained by the Commonwealth by virtue of the certificate and the Code, and that Code section says that when the certificate is filed, title is in the Commonwealth, which is defeasible until such time as there's been a deal or there is a final order of the condemnation panel.

So, I provided that it is defeased and fee-simple subject of existing liens is invested in the defendant. And three, that no road construction should take place affecting the property until they have taken the appropriate eminent domain procedures to obtain the right to do so.

And four, that the case is continued for hearing on the issue of damages occasioned by the taking, and that the order be spread among the land records, which would take care of the title situation.

The authority that I have for number four, which is the continuance of the case, which I think is what Mr. Moore objects to, is Code Section 33.1-125. I have a copy here for the Court. This is the Section that has to do with the amendment alteration or invalidation of a certificate.

And I draw the Court's attention to the last sentence thereof, which says — and I'm paraphrasing — nothing in

this section shall inhibit the court continuing the matter on after the invalidation of a certificate to determine damages.

The defendant would argue in this particular situation that the appropriate procedure in this case would be to continue this case on for the determination of damages.

I understand that Mr. Moore filed a new certificate yesterday, which takes 8,700 feet off the front of the property only. And I would suggest that when the petition to enforce that is filed, that that case be consolidated with this case and be tried, because we already have a date of September 29th.

It seems to me in the interest of judicial economy that that would be the appropriate way to do it.

I don't know whether or not the form of this order makes it interlocutory to the extent that Mr. Moore can appeal whatever property might have been taken pursuant to that decision.

MR. MOORE: It's premature, I think, to talk about consolidtion, whatever. I think we're only dealing with this issue now.

But if the Court takes it a step at a time, what its tendency has been, then we're talking about transferring the property back to him. We're enjoined, that's dispositive, and then this case is appealable.

What the State then does, what Mr. Radigan does, can be taken in sequence as we then approach the various —

THE COURT: (Interposing) Well, it seems like the two of you are together to a point. It seems like Mr. Radigan agrees with you in that if his assessment of the new certificate is a new case, which I believe it is, then that is a final case. I mean if a new one is filed, that one's over.

MR. MOORE: Yes, sir. I agree.

THE COURT: And I don't know what there is to consolidate if that one is over and the new one starts with the 8,700 square feet.

MR. RADIGAN: The only problem is where do we get the right to claim damages for the taking that took place in 1972, the construction that took place for a couple of months during 1976, the taking of the swimming pool, the interruption of business and loss of access for that period of time, and the damages which accrued, if they be recoverable — and I don't argue either way — by virtue of not being able to expand, not being able to borrow money on the property, and all those other things that took place in the interim.

And my concern is that —

THE COURT: (Interposing) Let's stop for just one second.

Suppose no new case is filed. What would be your remedy then?

MR. RADIGAN: To continue this case for the determination of damages only. And I think that's what the statute says.

THE COURT: I think that's what has to be done.

MR. MOORE: All right, sir.

THE COURT: It's logical, but that doesn't necessarily mean —

MR. MOORE: (Interposing) Well, I think that, as I said, that doesn't follow with what the remedy was that's been requested.

THE COURT: How much injury insofar as delay are * * *

* * * action for the damages. And if the State wants to proceed, they'll file another one on the new cause of action for the 8,700 — the new certificate.

MR. MOORE: Yes, sir.

THE COURT: Well, that's pretty simplified, too. I mean that keeps them all separate.

MR. MOORE: So, you don't intermingle them, and you do focus on what the issues that you're dealing with.

THE COURT: What would be wrong with that, Mr. Radigan?

MR. RADIGAN: Well, if the Court please, we have plead in our answer and grounds of defense in this case that we have been damaged by the taking; that we have been damaged by the incursion in 1976, removal of the pool, initiation of construction, and stated "during the time the Americana Motel business, which is conducted on the defendant's property, was adversely affected, access to Jefferson-David Highway was denied, traffic flow, circulation were adversely affected," and so forth.

And in our prayer for relief, we ask the defendant be compensated for loss of business over the 14-year period and its other damages proximately flowing from the taking of the property by the petitioner in 1972.

So, those issues are in this case at the present time. I don't think it's appropriate or proper for — and I understand what Mr. Moore's problem with the interlocutory nature of this order may be — but I don't think it's appropriate or proper for this case to be dismissed and for us to have to file a new suit for damages arising out of the actions that were done by the Court in this caes.

It's like a question in a negligence case with one party or the other conceding liability, proceeding on damages. It's the same thing.

And the consolidation issue is an interesting issue. It would require a very careful instruction of the condemnation panel if there were a consolidation. But I'm not sure that the panel, a blue ribbon group —

THE COURT: (Interposing) Yes, this is not your typical jurors.

MR. RADIGAN: And I don't see that that's insurmountable. But I think that's an issue for another day.

THE COURT: Well, it seems like to me, Mr. Moore, I had overlooked those questions of damages that were in the original pleadings. It seems like to me those issues are before the Court.

I'm going to enter this order and keep it at two causes of action. And I think it would be probably unnecessary to put the defendant in a position that I don't believe they should be in light of my previous ruling, to start all over.

Those damage questions would appear to be properly before the court.

And I agree with Mr. Radigan that we'll deal with this consolidation down the road.

* * * * *

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER,	)	
Petitioner	)	
v.	)	At Law No. 26828
AMERICANA CORPORATION, A Virginia Corporation, et al.	)	
Defendants	)	

ORDER

THIS MATTER came on to be heard upon the Notice and Motion of the State Highway and Transportation Commissioner, by counsel, for a *pendente lite* ruling to exclude the admission of any testimony, evidence or argument concerning attorney's fees, accountant's fees, economic losses and compensation for loss of business incurred during the period from January 1972 to August 1, 1986, all as set forth in Responses to Interrogtories filed herein, which elements of damage are claimed as a direct result of taking under Certificate No. C-20926, which Certificate was set aside by the Court on August 1, 1986, and the property was reconveyed to Defendant; and

IT APPEARING TO THE COURT upon examination of the legal memoranda submitted and argument of counsel of the parties that the evidence and testimony should be restricted and limited to damages which are directly related to the property; that these damages claimed by Defendant are not cognizable in condemnation proceedings and are not con-

templated by the provisions of §331.1 of the 1950 *Code of Virginia*, as amended, which ruling would exclude any testimony, or evidence of injury which might have been suffered as a result of attorney's fees, accountant's fees, business losses or economic damages during the pendency of the Certificate of Taking that was in force from January 1972 to August 1, 1986; it is, therefore

ADJUDGED and ORDERED that the landowner be and hereby is precluded from offering any testimony, evidence or argument relative to attorney's fees, accountant's fees, business losses and economic damages.

AND THIS CAUSE IS CONTINUED TO OCTOBER 9, 1986, for hearing .

ENTERED THIS 8th day of October, 1986

/s/ Benjamin Kendrick
Benjamin N.A. Kendrick
JUDGE

BEAN, KINNEY, KORMAN, HYLTON & MOORE

BY: /s/ William B. Moore
William B. Moore
2007 N. 15th St.
Arlington, Virginia 22201
525-4000
Counsel for Petitioner

SEEN AND EXCEPTED TO:

BARHAM, RADIGAN & MANNING, P.C.

BY: /s/ Charles McDonnell Radigan
Charles McDonnell Radigan
2009 N. 14th St. #215
Arlington, Virginia 22201
841-0011
Counsel for Defendant

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER,	)	
Petitioner	)	
v.	)	At Law No. 26838
AMERICANA CORPORATION, A Virginia Corporation, et al.	)	
Defendants	)	

ORDER

THIS MATTER came on to be heard upon the joint stipulation of the parties hereto, by counsel; and

IT APPEARING TO THE COURT that because of the ruling of the Court excluding evidence of business or economic loss, attorney's fees or accountant's fees as damages resultant from the filing of Certificate No. C-20926 from consideration herein, and that only items of damage directly related to the 1976-77 construction shall be considered by the Court, to which rulings Defendant excepted; and

IT APPEARING TO THE COURT that the parties stipulate and agree, as evidenced by the endorsement of counsel hereon, that the Americana Corporation has suffered these damages directly related to the real esetate by virtue of Certificate of Taking C-20926, as follows:

Identification Signs	$5,216.00
Relocation of access to Eads Street	$8,230.00
Swimming Pool	$15,000.00
TOTAL	$28,446.69

IT FURTHER APPEARING that the parties have waived any right to have these said damages determined by Commissioners, but both parties specifically reserve their objections to the Court's prior rulings herein; it is, therefore

ADJUDGED and ORDERED that the stipulation of the parties for damages suffered hereinabove is hereby confirmed and approved, and the State Highway Commissioner is hereby directed to cause a draft in the amount of $28,446.69 to be issued in favor of the Americana Corporation as satisfaction for any and all damages suffered by virtue of the voiding of Certificate of Taking C-20926; and it is further

ORDERED that the parties' objections to prior rulings of Court are hereby noted and reserved for purposes of any appeal.

THIS ORDER IS FINAL.

ENTERED this 8th day of October, 1986.

/s/ Benjamin Kendrick
Benjamin N.A. Kendrick
JUDGE

BEAN, KINNEY, KORMAN, HYLTON & MOORE

BY: /s/ William B. Moore
William B. Moore
2007 N. 15th St.
Arlington, Virginia 22201
525-4000
Counsel for Petitioner

SEEN AND EXCEPTED TO:

BARHAM, RADIGAN & MANNING, P.C.

BY: /s/ Charles McDonnell Radigan
Charles McDonnell Radigan
2009 N. 14th St. Suite 215
Arlington, Virginia 22201
841-0011
Counsel for Defendant

IN THE
SUPREME COURT OF VIRGINIA
RICHMOND

RECORD NO. 870009

AMERICANA CORPORATION, A Virginia Corporation
Appellant

versus

STATE HIGHWAY AND TRANSPORTATION
COMMISSIONER
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Americana Corporation, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Virginia, refusing the Petition for Appeal of Americana Corporation and finding no reversible error in the judgment of the Circuit Court of Arlington County which limited the damages which could be claimed by Americana Corporation, entered in this action on June 8, 1987, and from the judgment of the Supreme Court of the State of Virginia denying the Petition of Americana Corporation to set aside the judgment rendered on June 8, 1987 and grant a rehearing thereof, entered in this action on September 4, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2) and a copy of this Notice of Appeal is being filed with the Clerk of the Circuit Court of Arlington County.

/s/Frank E. Brown, Jr.
Frank E. Brown, Jr.
James M. Saunders
Mays & Valentine
2300 Ninth Street South
Arlington, Virginia 22204
(703) 521-5252

Charles McDonnell Radigan
Barham, Radigan & Manning
2009 North 14th Street
Arlington, Virginia 22201
(703) 841-0011

Attorneys for Appellant

FILED: November 13, 1987.

CERTIFICATE OF SERVICE

I, Frank E. Brown, Jr., a member of the bar of the Supreme Court of the United States, certify that on this 12th day of November, 1987, one copy of the foregoing Notice of Appeal, was mailed, first class postage prepaid, to William B. Moore, Bean, Kinney, Korman, Hylton & Moore, 2007 North 15th Street, Arlington, Virginia 22201 and Mary Sue Terry, Attorney General of Virginia, 101 North 8th Street, Richmond, Virginia 23219, counsel for State Highway and Transportation Commissioner.

I further certify that all parties required to be served have been served.

/s/ Frank E. Brown, Jr.
Frank E. Brown, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER	)	
Petitioner	)	
v.	)	At Law No. 26838
AMERICANA CORPORATION, a Virginia Corporation, et als.	)	
Defendants	)	

MOTION FOR INJUNCTION

COMES NOW Americana Corporation, by counsel, and moves this Court to award an injunction against trespass and/or construction of a state highway across its land, and in support thereof sets forth the following:

1. That on or about January 7, 1972, the Petitioner caused to be filed and recorded among the land records of Arlington County, Virginia, a Certificate of taking for Defendant's real property which is located on U.S Route 1, and upon which is constructed the American Motel, in Arlington County, Virginia. The deposit represented by the said Certificate has never been drawn down by Defendant, Americana Corporation.

2. That on or about April 10, 1986, Petitioner filed this Petition for Condemnation in order to ascertain just compensation for the land taken.

3. Defendant, Americana Corporation, filed an Answer to the said Petition which raised issues which, if decided in favor of the Defendant, would result of the dismissal of the Petition. These issues are as follows:

(1.) That Defendant has a right to have the property reconveyed to it pursuant to Title 33.1-90 of the 1950 *Code of Virginia*, as amended, in force at the date of taking.

(2.) That Petitioner never made a bona fide offer to purchase the property as is required by Title 25-46.5 of the 1950 *Code of Virginia*, as amended.

(3.) That the taking of the entire 61,473 square feet owned by the defendant and improved by a motel of 102 units is not necessary for construction of the road as is shown by Petitioner's plans which are Exhibits "A" and "B" to the Petition filed herein.

4. A contract has been awarded by the Petitioner and construction has begun along the U.S. Route 1 corridor in the vicinity of Defendant Americana Corporation's property. It is estimated that Defendant's property will be affected by such construction within approximately 10 days. Defendant has no adequate remedy at law.

WHEREFORE, Defendant, Americana Corporation, prays that the Court issue an injunction enjoining and forbidding any trespass or other incursion to the property of Defendant Americana Corporation except upon a proper Certificate of taking, said injunction to continue until the Petition be heard and resolved or until the existing Certificate be cancelled and a new Certificate of taking be filed which conforms to law.

AMERICANA CORPORATION

By: _____
Charles McDonnell Radigan
Its Counsel

BARHAM, RADIGAN & MANNING, P.C.
2009 North 14th Street, Suite 215
Arlington, Virginia 22201
(703) 841-0011

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Injunction was mailed, first class postage prepaid, to William B. Moore, Esquire, Counsel for Petitioner, 2007 N. 15 Street, Arlington, Virginia 22201, this 25th day of June, 1986.

Charles McDonnell Radigan

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

STATE HIGHWAY AND TRANSPORTATION COMMISSIONER	)	
Petitioner	)	
v.	)	At Law No. 26838
AMERICANA CORPORATION, A Virginia Corporation, et al.	)	
Defendants	)	

MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO STRIKE CERTAIN DAMAGES CLAIMED BY DEFENDANT

I. *BACKGROUND.* On August 1, 1986, this Court entered an Order and Injunction which, among other things, declared the Certificate of Taking recorded in Deed Book 1774, at page 400, void, invalid and of no further force and effect and continued the case for hearing on the issue of damages occasioned by the taking under that Certificate. This latter provision of the Order was based upon the language of §33.1-125 of the 1950 *Code of Virginia*, as amended, which states as follows: "Nothing herein contained shall be construed to prohibit or preclude any person damaged thereby, from showing in the proper proceeding the damage suffered by reason of . . . the invalidation of a certificate of deposit as herein provided." The substance of the Petitioner's Motion is to ask the Court to limit evidence at the hearing set for October 9, 1986, with respect to any proof related to businerss losses, economic damages, accounting fees and attorney's fees which allegedly arose out of the wrongful filing of the Cer-

tificate of Taking. It is asserted that the filing of the Certificate was wrongful as a matter of law because, pursuant to the provisions of §33.1-90 of the 1950 *Code of Virginia*, as amended, a lapse of time of more than twelve years made the Petitioner's delay in utilizing the property condemned legislatively unreasonable as a matter of law.

The Defendant will seek to place into evidence at trial, on October 9, 1986, damages resulting from:

1. *Accounting fees* related to the 1976-1977 construction period, accounting fees related to compliance with discovery requests of the Petitioner with respect to this proceeding, and accounting fees related to the loss of business and economic damage to the property.

2. The Defendant also will show that the property owner has paid substantial *attorney's fees* which were incurred as a direct and proximate result of the taking, and that such fees were reasonable and necessary and are appropriate as matters of damage under these circumstances.

3. The Defendant will show through comparison of revenues over time that substantial business revenues were lost during the period, November, 1976 - March, 1977, when access to Jefferson Davis Highway was cut off by the construction which took place on the highway. As the Court is aware, the motel fronts on that highway, and the loss of access did disrupt its business and cause *business losses.*

4. *Economic loss.* Further, the Defendant will show that its motel building is only half completed. Beginning in 1963 when the first thirty units of the Americana Motel were constructed, there was a continuing construction program: 32 more units were added in 1965; 20 more units were added in 1967; 10 more units were added in 1968; and 10 more units were added in 1969, totalling 102 units. Building permits were

granted by Arlington County for another 104 units to be built on a continuing basis. In 1970, when the State began threatening to condemn, this building program necessarily stopped. During the period that the now-invalid Certificate was in effect, the owner could not construct, refinance, remodel, or sell the property. It was titled in the name of the Commonwealth. Through two experts, Vincent L. Marcum, an appraiser, and Robert L. Gratton, a motel consultant who operated a motel in Crystal City from 1969 to1983, the Defendant will show that had the Defendant been able to continue its expansion program, the market would have filled the additional rooms, and it would have received substantial additional revenues. The experts have done a detailed analysis of the motel operation by examining the income and expense figures of the past sixteen years, room occupancy rates, and demand for motel rooms in the area to arrive at a reasonably certain figure representing lost profits directly related to the condemnation.

The above represents the proffer of the Defendant which Petitioner seeks to strike.

II. *ARGUMENT.* Aside from having based its proffered proof on the provisions of §33.1-125 which allows the Court to consider "the damage suffered by reason of . . . the invalidation . . .", Defendant bases its argument for restitution for these damages on Article 1, Section 6 of the Virginia Constitution which states that men cannot be damaged in their property without just compensation, reflecting the provisions of the due process clause of the United States Constitution.

It should be pointed out that the damages claimed herein are not the same damages as are confronted by courts with respect to an ordinary condemnation. In those proceedings, the issues are the fair market value of the land taken (to provide just compensation to the landowner) and the amount

of damages to the residue caused by the taking. There is a substantial distinction made in the statutes between "just compensation" and "damages". (See §33.1-127, §33.1-129, and §33.1-132.) The Petitioner's Memorandum asserts that damages to a trade or business are too remote and speculative to be recovered in a condemnation proceeding. It asserts that damages to the residue should not include damages resulting from the fact of the use of the land or a business carried on upon the residue. See *Ryan* v. *Davis*, 201 Va. 79, 82 (1959). It is agreed that the law in Virginia provides that in an ordinary condemnation proceeding, future business losses are not recoverable. However, this is not an ordinary condemnation suit. These damages arise out of an unreasonably delayed taking by the Commonwealth which directly affected the property rights of the Defendant. In an ordinary condemnation, the fair market value of the land taken reflects the profitability or the business losses of the entity affected. In this case, the actions of the Commonwealth in filing the Certificate in 1972 and leaving it on the property, even though further construction was enjoined for many years reflects such a conscious disregard of the rights of the owner that an inference of bad faith can be made. The damages contemplated by §33.1-125 are in the nature of tort damages, not condemnation damages.

When the Commonwealth was enjoined from further construction in March, 1977, why didn't it remove the Certificate of Taking? The Certificate had not been drawn down by the property owner, further construction would wait for a considerable period of time, and the Commonwealth could reinstitute condemnation proceedings at any time it wanted, merely by the filing of a new Certificate.

It is submitted that the reason that the Commonwealth did not take such action is because, based on the statute, it would lose the 1972 basis in the property that was acquired by the filing of the Certificate at that time. Because of the

tremendous growth in opportunity and value of land in Crystal City, perhaps this low value was important to the Commonwealth. Obviously, the invalidation of the 1972 Certificate was not a voluntary dismissal of the proceedings by the Commonwealth. But, so that the Court is aware of the intent of the legislature with the regard to dismissals of proceedings for condemnation, attention is directed to §25-46.34, which provides that in the event that the Commonwealth dimisses proceedings for condemnation prior to award, the Defendant is entitled to attorney's fees, witness fees, including reasonable expert witness fee, and other reasonable expenses and compensation for time spent as a result of the proceedings. Obviously, the legislature recognizes that it is fair and appropriate that if the Commonwealth put someone to his proof in attempting to defend a condemnation proceeding and then dimisses the matter, the owner's expenses should be covered. A similar approach should be taken when the Commonwealth's Certificate is voided for delay.

The effect of the Certificate of Taking upon the land of the Defendant from 1972 through 1986 resulted in a loss of business opportunity for the Defendant. He was not able to complete his planned expansion program, he was not able to increase the value of his property, and he could not sell it. The Petitioner, on page 2 of his Memorandum, has pointed out that had the landowner drawn down the $1,596,295 represented by the Certificate in 1972, as he was entitled to do, he could have received interest on that amount totalling, through 1986, $6,362,819. The Defendant did not draw down the Certificate because he felt that the taking was illegal, wrongful and unnecessary. The State condemned his entire property, when only a small strip across the front was needed for the expansion of the highway. The Defendant has, by his actions, saved the State $6,362,819 by not drawing down the Certificate during that period of time. Accordingly, it

would seem that if his damages, by virtue of the filing of the invalid Certificate, are less than that amount, then the Commonwealth would come out better than if he had drawn down the Certificate at the time he was entitled to do so.

III. *ECONOMIC DAMAGES.* It is submitted that because of the filing and pendency of the Certificate which placed title to the land in the Commonwealth, Defendant could not expand his facility in order to take advantage of the fantastic growth occurring in the Crystal City area with respect to office and motel room development. In *6 Nichols, Eminent Domain,* (3rd Ed.) §26.45, at page 26-298.2, it is stated:

> "When condemnation proceedings are discontinued, even when there has been no disturbance of the actual occupancy of the land, the owner often suffers pecuniary loss during the pendency of the proceedings. It is difficult to find tenants and unsafe to build on the land. He may stop work on a partially constructed building or adapt it to the proposed improvement. He is almost certain to have incurred an attorney's fee. But it is held, *in the absence of bad faith or unreasonable delay,* upon the part of the party which instituted the proceedings, that the owner is not constitutionally entitled to recover such expenses and losses." (Emphasis Added)

Many cases are cited by *Nichols* in support of this proposition. Obviously, the opposite is true. If there has been evidence of bad faith or unreasonable delay, then damages resulting from the disturbance of the title of the Defendant are admissible. It is submitted that the legislature has stated through §33.1-90 that more than twelve years constitutes an unreasoanble delay. *Nichols* goes on to state:

> "In some states it has been held that in all cases where condemnation has been discontinued after

> an unreasonable delay, the owner may recover in an action in the nature of trespass on the case for the loss suffered by the pendency of the proceedings."

(citing *Carson* v. *Hartford,* 48 Conn. 68; *Winkelman* v. *Chicago,* 213 Ill. 360, 72 N.E. 1066; *Pittsburgh, etc.* v. *Swinney,* 97 Ind. 586; *Norris* v. *Baltimore,* 44 Md. 598; and many others). Constitutional due process requires that the owner be put in as good a position as he would have occupied if his property had not been taken. This position was required by the 4th Circuit Court of Appelas in *Town of Clarksville, Va.* v. *United States,* 198 F.2d 238 (4th Cir. 1952), when the United States condemned a part of the town's sewer system and agreed to replace it with a substitute equivalent system. Because of the change and subsequent environmental protection laws, a treatment plant was necessary for the system. The Court awarded the increased cost of *operating* the new treatment system as damges to the town. In *Roach, et al.* v. *Village of Winnetka,* 366 Ill. 578, 10 N.E.2d, 356 (1937), the Illinois Supreme Court held that a condemnee is constitutionally entitled to damages for a taking subsequently abandoned if there had been an unreasonable delay on the part of the condemnor. In this case, the Court held that there was not an unresonable delay but set out what it considered to be the test of fundamental fairness where such a delay occurs. It held that in a condemnor wrongfully delayed the trial or final condemnation of a piece of property, it was liable to the owner of the land for damages, both wrongful and injurious occasioned by such unreasonable delay. The owner under such circumstance is entirely without any means of hastening the time when the condemnation would be finalized. Public policy should forbid that a condemnor should be permitted to practice such an imposition on a property owner.

In *Fruit Grower's Express* v. *Alexandria,* 216 Va. 602

(1976) which was a tax assessment case, the Supreme Court of Virginia held that the projected earnings of a nonexistent enterprise or projected use could not be capitalized to obtain fair market value. While the Court recognized that fair market value in tax cases is approached in a similar fashion to eminent domain cases, the Americana case is different. We are not dealing with fair market value or just compensation but rather tort like damages for tying up property in a way determined by the legislature to be wrongful. Here we have an existing use, an approved expansion plan and experts who will testify on the demand and the market for motel rooms in that particular area.

IV. *BUSINESS LOSS.* Many cases in Virginia, including *Town of Galax* v. *Waugh*, 143 Va. 213 (1925), recognize that loss of access is a damage for which the Constitution provides compensation in condemnation proceedings. In 1976 prior to the State construction and widening of Jefferson Davis Highway, the Americana Motel had two entrances from that road. This direct access was an important business asset. During the five months that construction took place in 1976-1977, the motel business was directly affected. Proof of losses during this 5-month construction time are just and proper in a situation where such damages were caused by loss of access to the road. While the Petitioner argues that there was access to the motel through the back entrance (South Eads Street), the Defendant should be allowed to testify on the differing income revenues during that period as contrasted with normal revenues, and the commission be allowed to determine the damages, if any, resulting therefrom.

V. *ATTORNEY'S FEES.* Many states have statutes similar to §25-46.34 which allow attorney's fees in the event that condemnation proceedings are dismissed prior to award by the condemning authority. However, in a State which had

no such statute, Arkansas allowed attorney's fees if the owner could establish that the institution and abandonment of proceedings by the condemnor were made in bad faith. See *Des Arc Watershed Improvement Dist.* v. *Finch*, 630 S.W.2d 17 (Ark. 1982). In a Virginia case cited by Petitioner in his Memorandum, *Hiss* v. *Friedberg*, 201 Va. 572 (1960), the Supreme Court awarded attorney's fees where the actions of Hiss in conducting a real estate settlement were such as to cause his former client to file a suit to straighten out the title. While the Court recognized that attorney's fees were not normally recoverable in Virginia, it stated at 577:

> "It is generally held that where a breach of contract has forced the plaintiff to maintain and defend a suit with a third person, he may recover the counsel fees incurred by him in the former suit provided they are reasonable in amount and reasonably incurred."

Because the counsel fees were necessitated by the actions of the Defendant Hiss, the Court felt that counsel fees should be awarded the Plaintiff. The Court placed great reliance on the fact that the Plaintiff was defending his title. No less has Americana Corporation attempted to defend its title by contesting the State's right to condemn its entire motel property when all that was necessary was a small portion thereof. Courts have great power and discretion in awarding attorney's fees. In *Sperry Rand Corp.* v. *Electronic Concepts, Inc.*, 325 F.2d 1209 (E.D.Va. 1970), the District Judge awarded attorney's fees by virtue of the oppressive conduct of Defendants and their bad faith in appropriating an invention, solely based on equitable principles.

At what point may an award of attorney's fees lie in this action? Would it have been in 1972, after the Commissioner made an offer which was rejected on the original easement that was necessary and recorded a Certificate which took the

entire property? Would it have been in 1976, when the State initiated construction, removed the swimming pool and closed off access to the highway; would it have been in April, 1986, when the Commissioner filed a Petition to award damages to the Defendant; or would it have been in August, 1986, after the Court had declared the original Certificate invalid, and the Commissioner filed another Certificate to take the easement property at a valuation of $1,000, which works out to 11¢ a square foot. Obviously, the Defendant had to obtain counsel to defend his rights in this matter. He should be placed in the same position as he would have been if the original Certificate had not been filed and, accordingly, should be awarded his attorney's fees and accountant's costs which were related to the actions taken by the Commonwealth.

Respectfully submitted,

By: /s/ Charles McDonnell Radigan
Charles McDonnell Radigan
Counsel for Americana Corporation
BARHAM, RADIGAN & MANNING, P.C.
2009 North 14th Street, Suite 215
Arlington, Virginia 22216

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum was hand-delivered, to William B. Moore, Esquire, Counsel for Petitioner, 2007 N. 15th Street, Arlington, Virginia 2216, this 24th day of September, 1986.

/s/ Charles McDonnell Radigan
Charles McDonnell Radigan

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 870009

AMERICANA CORPORATION, a Virginia corporation,
Appellant.

versus

STATE HIGHWAY & TRANSPORTATION COMMISSIONER,
Appellee.

PETITION FOR APPEAL

TO THE HONORABLE, THE JUSTICES
OF THE SUPREME COURT OF VIRGINIA:

Americana Corporation, Petitioner, is aggrieved by two Orders entered October 8, 1986 limiting and excluding evidence offered to prove damages caused by the filing of an invalid Certificate of Taking by the State Highway and Transportation Commissioner in a condemnation case. The transcript of the proceedings in the Trial Court will be transmitted with the Record by the Clerk of the Circuit Court of Arlington County, Virginia and your Petitioner prays that an appeal be allowed, that said Orders be reversed, that the case be remanded to the Circuit Court of Arlington County, Virginia, and that said Court be ordered to proceed with the

hearing on damages occasioned by the filing and duration of the invalid Certificate. Appellant herein shall be referred to as "Americana" and Appellee as the "Commissioner."

NATURE OF THE CASE, STATEMENT OF FACTS AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

This case arises out of a condemnation proceeding where the Trial Court found that the Certificate of Taking filed by the Commissioner was void, invalid and of no further force and effect pursuant to the provisions of Title 33.1-90 of the 1950 *Code of Virginia* and limited evidence of damage resultant from the filing of that certificate to those damages *directly related* to the property and excluded evidence proffered by Americana as to business and economic loss, and attorneys' and accountants' fees.

On or about January 7, 1972, the State Highway Commissioner, now known as the State Highway & Transportation Commissioner, caused to be filed among the land records of Arlington County, Virginia in Deed Book 1774, Page 400, a Certificate of Taking (No. C-20926) for land owned by Americana and described as Lots 1A and 1B of the James A. Watson, Jr. Addition to Pentagon Industrial Center and totalling some 61,473 square feet of land in Arlington County, Virginia, improved by a 102 unit motel building fronting on U.S. Route No. 1 (Jefferson Davis Highway).

The amount set forth in the Certificate as representing the value of the taking was $1,596,295.00. The land taken by the Certificate was used by the Americana Corporation to operate a motel business. The amount represented by the Certificate was never drawn down by Americana. It continued to operate its motel business on the property and does so at the present time. Except for a brief incursion in 1976-77, the

Commissioner never took possession of any of Americana's land.

On or about April 10, 1986 the Commissioner filed a Petition in the Arlington County Circuit Court for condemnation of the property owned by Americana Corporation which had been described on Certificate No. C-20926 filed in 1972. Two lenders, Continental Federal Savings Bank and Sovran Bank, N.A., were given notice of the filing of the Petition, but have made no substantive appearances in the lawsuit.[1] Americana answered the Petition asserting among other defenses that it had a right to have the property reconveyed to it pursuant to Title 33.1-90 of the 1950 *Code of Virginia*, as amended.

In June of 1986, construction was begun on improvements to U.S. Route 1 which would affect the Americana property and Americana filed a Motion for Injunction praying that construction be enjoined until such time as a valid Certificate of Taking be filed by the Commissioner.

After briefing testimony and oral argument, the Trial Court by Order entered August 1,1986 determined:

> 1. That Certificate No. C-20926 was void, invalid and of no further force and effect;
>
> 2. That title to the land taken by that Certificate be restored and vested in Americana;
>
> 3. That no further construction take place until the

[1]Continental filed a *pro forma* Answer on May 1, 1986 without responding to the merits and asked that no decree be entered to its prejudice. Sovran Bank filed no pleadings. Neither counsel for the lenders nor any representative thereof made any appearance in any of the subsequent proceedings. The notes, repayment of which were secured by the Deed of Trust to the banks, were paid long prior to the filing of the Petition, although the Deed of Trust was not released of record.

Commissioner had taken the property necessary for such construction by appropriate procedures; and

4. That the case be continued for a hearing on thte issue of damages occasioned by the taking.

Prior to the hearing on damages, the Commissioner filed a Motion to Strike certain damage claims of Americana. In response to Interrogatories posed by the Commissioner, Americana had stated that at the trial on damages it would claim losses resultant from the fourteen year pendency of the Certificate including:

1. Losses from the demolition of the swimming pool, driveway and removal of sign caused by prior construction during 1976-77 immediately prior to a Federal injunction which halted construction at that time;

2. Accounting and legal fees in connection with oppositioin to the condemnation proceedings;

3. Loss of business;

4. Economic loss because of the inability of Americana to expand or improve its facilities during the fourteen year period.

Americana proffered an expert appraiser and an expert on the motel business to substantiate its damage claims regarding economic loss and loss of business.

After briefing and argument, the Arlington Circuit Court ruled by Orders entered October 8, 1986 that evidence and testimony should be limited at the damage trial to those damages directly related to the property and that damages claimed for attorneys' fees, accountants' fees, business loses or economic damages which may have accrued during the pendency of Certificate No. C-20926 were not cognizable in condemnation proceedings nor contemplated by the provi-

sions of Title 33.1 of the 1950 *Code of Virginia*, as amended. While preserving objection to those Orders, Defendant settled the case with Petitioner with respect to the property damage directly caused by the 1976-77 construction, the Order embodying which was entered by the Court on October 8, 1986. It is from those Orders that the Defendant Americana Corporation appeals.

QUESTION PRESENTED AND ASSIGNMENT OF ERROR

Whether the Court erred in restricting evidence and testimony of damages to those damages directly related to the property and in ruling that testimony and evidence as to damage suffered relating to attorneys' fees, accountants' fees, business loses and economic damage during the pendency of the taking from January 7,1972 to August 1, 1986 were not cognizable in condemnation proceedings and are not contemplated by the provisions of Title 33.1 of the 1950 *Code of Virginia*, as amended.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

A. Once a Certificate of Taking is found to be void and invalid, damages caused by the taking are recoverable by the landowner.

Once the Trial Court applied Code §33.1-90 to invalidate the 1972 Certificate and restored title in Americana, it was appropriate, based upon due process considerations and Code §33.1-125 which grants jurisdiction over such certificates and authorizes determination of damage caused by mistaken or invalid certificates, to schedule a damage hearing. The *Constitution of Virginia* in Article I, Bill of Rights, requires in Section 11 that citizens cannot "be deprived of life, liberty

or property without due process of law; that the General Assembly shall not pass any law. . . whereby private property shall be taken or damaged for public uses, without just compenstion . . . ." Code §33.1-125 addresses and codifies this constitutional requirement with respect to invalid certificates of taking. The legislature provided that a person may show "the damage suffered by reason of such mistake or invalidation of the Certificate . . . ." Code §33.1-125.

B. Damages considered at such a hearing should not be limited to those direct damages to property resulting from invasion by the Commissioner.

The Trial Court only allowed damages to compensate Americana for the *destruction* of a swimming pool, driveway and *moving* of a sign when construction of Interstate 595 was attempted on U.S. Route 1 in 1976-77 before being enjoined by the United States District Court. The Commissioner argued that only "condemnation-like" damages were recoverable under the provisions of Title 33.1. In routine condemnation proceedings damage evidence concerns the fair market value of the land taken and the damage to any residue of a parcel not taken but affected by the condemnation. Future business loss and profits are not recoverable and are considered too speculative. Valuation of the property taken includes such intrinsic attributes of value. See *Ryan v. Davis*, 201 Va. 79, 109 S.E.2nd 409 (1959); *Brown v. May*, 202 Va. 300, 117 S.E.2nd 101 (1960).

Here, after the filing of the Certificate, the Commissioner did *not* take possession of the Americana land and Americana continued its motel business, as best it could, in "limbo" for fourteen years. Other than for a few months in 1976-77 affecting a small portion of Americana's land, no road construction was undertaken. The Trial Court found the Commissioner's inaction "statutorily unreasonable and arbitrary" as

defined by Code §33.1-90. The Commissioner filed the Certificate and then abandoned the project. The effect on Americana was enormous. It could not borrow money against the property. It could not improve the motel. It could not expand its business facilities. Ordinary and routine maintenance of its facilities was financially risky because it did not own the property and possession could be demanded by the Commissioner at any time. It had no lease, but was a squatter, a tenant at sufferance. As could be expected, the condition of the premises deteriorated over the fourteen year period. The Commissioner, if the planned road would not be constructed in the foreseeable future, could have withdrawn the Certificate. He chose to do nothing.

It is Appellant's position that in a situation where a certificate of taking is invalidated and land restored by virtue of failure to act by the Commissioner, that the General Assembly provided and due process requires "tort-like" damages for "tort-like" conduct to compensate the landowner. It is conceivable that *no* destruction of property (such as the swimming pool) could have occurred in this case. Then under the Trial Court's ruling, Americana would not be entitled to any damages.

The General Assembly contemplated some type of non-traditional condemnation damage when it enacted Code 33.1-125 for damage suffered by virtue of mistake or invalidation. Code §25-46.34 provides for payment of legal fees, expert witness fees and compensation for time spent, by the Commissioner to the landowner when he *voluntarily* dismisses a condemnation proceeding. This case involves an *involunary dismissal.*

This Court recognizes that statutory provisions should be read so as "to promote the ability of the enactment to remedy the mischief at which it is directed." *Jones v. Conwell,* 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984).

Consequential damages have been allowed in condemnation cases under the theory that the constitutional words "and damages" broaden the recovery. Negligence is not required so the traditional tort defense of sovereign immunity is not applied. *Heldt v. Tunnel District*, 196 Va. 477, 84 S.E.2d 511 (1954).

CONCLUSION

The filing of the Certificate of Taking was wrongful because the Commissioner's delay in utilizing the property condemned became legislatively unreasonable as a matter of law. In what is believed to be a case of first impression, Americana asks to be allowed to prove with reasonable certainty its economic losses proximately caused by the filing of the invalid Certificate. Americana prays that the Trial Court's Orders of October 8, 1986 which limited proof of damages be reversed and this case be remanded for a hearing of damages occasioned by the filing and duration of the invalid Certificate.

Respectfully submitted,

Charles McDonnell Radigan
Counsel for Americana Corporation
APPELLANT

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 8870009

AMERICANA CORPORATION, a Virginia corporation,
Appellant.

versus

STATE HIGHWAY & TRANSPORTATION COMMISSIONER,
Appellee.

PETITION FOR REHEARING

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

After oral argument on its Petition for Appeal by Americana Corporation, the Court found no reversible error in the judgment complained of and refused the Petition for Appeal by Order entered June 8, 1987. On June 9, 1987, the Supreme Court of the United States decided *First English Evangelical Lutheran Church of Glendale, Appellant* v. *County of Los Angeles, California*, No. 85-1199 55 L.W. 4781, which case found that a flood control ordinance, which temporarily prevented all use of Appellant's land, was a compensable taking even though the ordinance was later invalidated. The Court found that this temporary restriction on the use of the

Appellant's land was such as to require compensation under the Fifth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment. While this was not a formal taking, and a case where the doctrine of inverse condemnation was applied, the right to compensation for a temporary interruption with use was clearly recognized by the Supreme Court of the United States in this case. At 55 L.W. 4781 the Court stated

> "Where this burden results from the governmental action that amounted to a taking, the just compensation clause of the Fifth Amendment requires that the government pay the land owner for the value of the use of the land during this period. Cf. *United States* v. *Causby*, 328 U.S., at 261 ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken"). Invalidation of the ordinance or its successor ordinance after this period of time, although converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the just compensation clause."

Americana's dilemma when the certificate was filed by the State Highway Commissioner in 1972 was that if they took down the amount represented by the certificate, such action would provoke immediate tax consequences as it would be deemed a sale, and the Commissioner would, no doubt, take possession of and level the motel building, and any chance it might have to recoup the property if its argument that the taking was wrongful and overlarge was upheld, would be lost. The fact that Americana was denied some of the incidents of ownership of the property for the 14-year period when the Certificate of Taking was in effect, should be compensable under the United States and the Virginia Constitutions.

WHEREFORE the Appellant respectfully requests the Court reconsider its denial of the Petition for Appeal and rehear this matter.

AMERICANA CORPORATION

By /s/ Charles Mcdonnell Radigan
Charles McDonnell Radigan
Its Counsel

CERTIFICATE

Charles McDonnell Radigan, counsel for Appellant, hereby certifies that a copy has been mailed or delivered to counsel for the Appellee, State Highway & Transportation Commis *sion, c/o* William B. Moore, Esquire, Bean, Kinney, Korman, Hylton & Moore, 2007 N. Fourteenth Street, Arlington, Virginia 22216, (703) 525-4000, this 18th day of June, 1987.

/s/ Charles McDonnell Radigan

PARTIAL TRANSCRIPT OF PROCEEDINGS

July 10, 1986 - Cross Examination of Thomas W. Ford, Jr., Right of Way Manager for the Northern Virginia Office of the Virginia Department of Highways & Transportation, By Counsel for Americana Corporation

* * *

Q. (MR. RADIGAN) Let me ask you a question. In looking at your file with respect to the Americana property —

A. (Interposing) Yes.

Q. (Continuing) — at the time the certificate was filed in 1972, are you familiar with the plans for I-595, which was to be built there at that time? Have you examined those plans?

A. I have not examined those plans, no.

Q. Do you know whether or not those plans required that the building, the motel building itself, be disturbed?

A. I do know that. I have examined the plans to that extent. I do know the building was not within the area of construction.

Q. So that there was no requirement for construction of the road that the building be taken?

A. Not that I know of.

Q. Is that true at the present time?

A. Yes.

Q. Under the present plans?

A. Yes.

Q. Now, the present plans deal with a state highway rather than a federal aid highway as in 1971?

A. Yes, sir.

Q. So, it's a different highway project, isn't it, than it was before?

A. Yes, it is a different highway number.

Q. And it's a different project? It's not the same road?

A. I don't know how to answer that.

Q. It's a different highway?

A. It's a different highway project.

* * *

THE COURT: Here's the problem that I'm having. Here's the problem that I'm having, and I want both of you to be thinking about it, and you may have to brief this.

This is the initial and very difficult problem that I'm grappling with. There are two of them. If 595, that original project for which that certificate was abandoned — I'm not so sure that it wasn't — and if it was abandoned, then I'm not so sure that the certificate that goes to the project is also abandoned.

Now, the second hurdle that I'm having difficulty with is that this has been and in some ways could still be lingering around in the federal court. You're dealing with this constitutional concept of taking property and what's reasonable compensation.

I'm not so sure that that federal constitutional question shouldn't be dealt with if there is a vehicle to deal with. You understand what I'm suggesting there?

* * *

MR. RADIGAN: I understand that, Your Honor.

And if that were abandoned — if it was abandoned, then as far as I'm concerned, there is no interruption in the run-

ning of the 12-year period, and the language that says let the contract or construction commence doesn't apply.

And I think if the Court makes the finding that the road for which the certificate was filed was abandoned and this present road that's to be build and is in construction is a state-funded road, it's similar, but it's not the same project.

And Mr. Ford also testified as to that. I think on that basis, the court could find that this certificate is not any good. And if the state wants the land, they should file a new certificate, which would mean that they would pay 1986 prices for the property.

Or, secondly, whether there's not — and I didn't brief this — but there are a number of due process type things that come about.

One of them is just laches, that you can sit and wait for all this period of time and do nothing and have people rely and then come in and say 1972 prices —

THE COURT: (Interposing) Just say well, he could have drawn down does not make me feel any better because you have a person who's sitting on limbo worrying about their property for 15 years. And to say well, there was some money over there that he could have drawn down on, true, but they had drawn down too much; they may have been given something.

The chances of that are slim. I'm not convinced that that — there's something unfair about that.

MR. RADIGAN: And that property — the minute that certificate was filed, according to 33.1-122, the statute says upon recordation, titles shall vest in the Commonwealth, and the owner shall only have an interest in the funds.

So — and it later says that that title is defeasible until there's an agreement or until compensation has been determined by the Commission.

Now, that defeasibility is what I'm talking about. My client has a right of reverter, a possibility of reverter based on this statute. And if the conditions set forth in that statute apply, he's got a right to have the property back. And if the state wants to take it and they can show that it's necesasry for the construction of this new road, then they should file another certificate.

With respect to the question as to whether there's a more basic question of due process in allowing a proceeding for condemnation to proceed in 1986 based on 1972 values is a question that I did not brief, and frankly, it sounds so fundamentally unfair —

THE COURT: (Interposing) It does. It does to me.

MR. RADIGAN: If the Court please, the Court could resolve that by finding that this I-595 has been abandoned; the statute applies; and that issue is not necessary to be reached.

Whether or not the statute in Virginia that says when you file a certificate that determines the value as of that date, whether that particular statute is unconstitutional on these facts is a very neat question.

And, if the Court please, I'm not sure that that is — I can tell you this. From my research, that's never been decided in Virginia. It would be brand new and exciting.

THE COURT: If there is any notion left of the property rights, this is the vehicle.

MR. RADIGAN: That's it.

THE COURT: This is the vehicle to do it. I may be the sacrificial lamb.

MR. MOORE: Your Honor, I think the fundamental problem that maybe the Court has is to say well, look, it's really unfair if in this system for the Court to be able to come in there and then take that property and then pay for it later.

I mean theoretically, if they're paying fair market value —

THE COURT: (Interposing) I think that's two-pronged. Now, if you're saying that in 1972 we envisioned these plans and, for whatever the reasons, we have been actively pursuing this, and it's just now, that's one situation.

On the other hand, if you go back to 1972, you have a little skirmish here; you have a little bit of skirmish in there and, for some reason — could be that people are just tired of litigating with Arlington County; I don't know what the problem was, but whatever the reason — if they say — throw up their hands and say that's it, no more of this project, and everything that they got initially was directed to that specific project and they have abandoned it, then I think you've got a different situation than the former.

And I think the due process notions on the two are completely different, depending on which one you're dealing with.

* * *

Partial Transcript of Proceedings
July 25, 1986

MR. RADIGAN: If the Court please, we have been back and forth on this for about two weeks and I know the Court has read a lot of pages. I would like to address two issues. First, one has to do with the good faith argument that Mr. Moore made and while I don't feel it is determinative, I don't want to give it up.

The evidence is clear that Mr. Green was offered one dollar a foot for the land across the property. He refused that.

THE COURT: Then he took the whole thing.

MR. RADIGAN: He took the whole thing though he felt it was wrong to take the whole thing and Mr. Moore says the only justification any Commissioner can have for doing it is making a finding that the value of the 9,000 feet and the damages arising from it would exceed the one million five that stands now.

Now my client comes back here and Mr. Green, we believe that the one million and six hundred thousand dollars offered by the State is being made for the front and he says the offer was for the whole thing and they don't even take it and more interesting, fourteen years later Mr. Ford, the witness who testified, states they didn't need it in 1972 and we don't need the building today. Their petition asks for the whole thing.

Now, if you are going to act in good faith and they have a right to amend at any time and I think the State can amend the Certificate at any time I don't know why they didn't amend the Certificate and take the front part now and litigate the front part now instead of retaining or taking that which was done in 1972.

THE COURT: I suspect it is tied up in the issue of damages somewhere.

MR. RADIGAN: Well, I don't know, I don't know, but the Commonwealth is the sovereign and they could try to deal with it fairly and up front with the individual whose land they are taking.

If the Court please, they are trying to continue to put this entire property in jeopardy when according to Mr. Ford's testimony it is not necessary for construction to attack one brick in the motel and that they can continue to operate and function. * * *

BARHAM, RADIGAN & MANNING, P.C.

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June 29, 1987

Clerk
Supreme Court of Virginia
100 North Ninth Street
Fourth Floor
Richmond, VA 23219

RE: American Corporation, a Virginia Corporation, Appellant v. State Highway and Transportation Commissioner, Appelle, Record No. 870009

Dear Sir:

Please supplement the Petition for Rehearing in the above-referenced matter by bring to the Court's attention the case decided June 26, 1987, by the Supreme Court of the United States, entitled *James Patrick Nollan, et ux., Appellent v. California Coastal Commissioner,* No. 86-133, 55 L.W. 5145.

Appellant feels that this case further strengthens its position with respect to this appeal.

Yours very truly,

Charles McDonnell Radigan

CMR/cvg

cc: William B. Moore
William D. Green